

<sup>2</sup> The Board notes that the record includes evidence received after OWCP issued its February 4, 2016 decision. On appeal, the Board is limited to reviewing the evidence that was before OWCP when it issued its final decision. 20 C.F.R. § 501.2(c)(1). Therefore, the Board is precluded from reviewing this evidence on appeal.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances of the case as set forth in the Board's September 19, 2011 decision are incorporated herein by reference. The relevant facts follow.

Appellant, a 56-year-old transportation security officer, was injured in the performance of duty on December 5, 2009 when she fell from a 20-inch high platform. Her current accepted conditions include cervical, thoracic, and lumbar sprains, chest wall contusion, permanent aggravation of cervical intervertebral disc disorder with myelopathy, and permanent aggravation of lumbar intervertebral disc degeneration. When the case was last on appeal, OWCP had terminated appellant's wage-loss compensation and medical benefits effective May 12, 2010.

By decision dated September 19, 2011, the Board reversed OWCP's termination of compensation benefits because it had not met its burden of proof. On October 4, 2011 OWCP advised appellant that her claim was reopened for medical treatment.<sup>4</sup> Appellant subsequently received wage-loss compensation retroactive to February 11, 2010, and thereafter placed her on the periodic compensation rolls effective April 8, 2012.<sup>5</sup>

In February 2015, OWCP referred appellant for vocational rehabilitation services based on the October 8, 2014 findings of her treating physician, Dr. Christopher A. Fisher, a specialist in physical medicine and rehabilitation. At the time, Dr. Fisher diagnosed mechanical low back pain, cervical and lumbar muscular and myofascial pain, and ongoing cervical and lumbar pain likely due to discogenic etiology at C4-5, C5-6, and L5-S1. He advised that appellant had reached maximum medical improvement (MMI). Dr. Fisher also recommended a functional capacity evaluation (FCE), and indicated that appellant could work in a light-duty status pending the FCE results.

In a February 10, 2015 letter to appellant, the rehabilitation counselor advised that an FCE was scheduled for March 2, 2015.

The rehabilitation counselor interviewed appellant on March 2, 2015 just prior to the scheduled FCE. She reviewed appellant's employment history, conducted a transferrable skills analysis, and tentatively scheduled vocational testing for later that month.

On March 2, 2015 an FCE was conducted by Doug Ellis, a physical therapist. Mr. Ellis found that appellant had participated on only a limited basis during the FCE and reported inconsistencies in her presentation, as well as self-limiting pain behaviors. He observed signs of symptom magnification and the probability of a less than maximum effort. Appellant

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<sup>3</sup> Docket No. 10-1998 (issued September 19, 2011).

<sup>4</sup> At the time, the only accepted conditions were cervical, thoracic, and lumbar sprains, and chest wall contusion. In November 2012, OWCP expanded the claim to include permanent aggravation of cervical intervertebral disc disorder with myelopathy and permanent aggravation of lumbar intervertebral disc degeneration.

<sup>5</sup> The employing establishment had removed appellant from service effective September 20, 2010 because it was unable to accommodate her injury-related work restrictions.

demonstrated inconsistencies, such as giveaway strength of her lower extremities, as well as variations in the range of motion of her hips and shoulders when comparing that measured and observed. She discontinued with various activities due to reports of increased symptoms and sat for a brief period of time, but then continued to perform additional activities demonstrating no changes in her previously observed pain behaviors or movement patterns. Mr. Ellis concluded that the results of the FCE were, therefore, determined to be unreliable and invalid.

In a March 11, 2015 letter, OWCP advised appellant that the March 2, 2015 FCE results were considered invalid due to multiple inconsistencies in her performance during the testing. It also noted that she had not given maximum effort, and there was also evidence of symptom magnification. Additionally, OWCP noted that pursuant to 5 U.S.C. § 8113(b), if an individual without good cause fails to apply for and undergo vocational rehabilitation when so directed, and OWCP finds that in the absence of the failure the individual's wage-earning capacity would probably have substantially increased, it may reduce prospectively the compensation based on what probably would have been the individual's wage-earning capacity had she not failed to apply for and undergo vocational rehabilitation. It further stated:

“Also, [s]ection 10.519 of Title 20 of the Code of Federal Regulations provide that if an individual without good cause fails or refuses to participate in the essential preparatory efforts as described above, OWCP will assume, in the absence of evidence to the contrary, that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and compensation will be reduced accordingly. In effect, this will result in a reduction of compensation to zero.”

OWCP afforded appellant 30 days to contact the vocational rehabilitation counselor to make a good effort to participate in the rehabilitation effort or to provide good reasons for noncompliance.

In a report dated March 25, 2015, Dr. Fisher noted that appellant continued to have a significant degree of muscular and myofascial pain, as well as discogenic pain symptoms. He reiterated that she had reached MMI and recommended a repeat FCE given that the first was invalid.

On March 30, 2015 Mr. Ellis conducted a repeat FCE. Once again, he found the results unreliable and invalid due to continuing signs of symptom magnification and self-limiting pain behavior. Mr. Ellis noted that prior to the start of the evaluation he reviewed the prior testing and discussed specific examples of inconsistencies. Appellant was encouraged to ask questions and participate at her best level. Mr. Ellis instructed her to report increased symptoms or to stop any test if she could not complete the activity, if her pain increased beyond a level where she could not continue, or if she was experiencing any other difficulties, such as fatigue or shortness of breath. He found that appellant produced positive Waddell's signs in the four major categories in which she was able to participate. Mr. Ellis opined that this was a positive test for symptom magnification. Appellant declined to lie on the treatment table and was unable to produce any grip strength using a hand dynamometer with her left upper extremity. The grip strength produced with her right hand with dynamometer testing was also significantly low. Appellant produced a coefficient of variation which exceeded 15 percent with one grip strength

test performed using her right upper extremity, with both lower extremities during the knee extension strength testing, and with the static pull and push testing. Mr. Ellis opined that these were inconsistencies. Appellant produced giveaway strength of both lower extremities during the manual muscle testing procedures, but there was no observed functional weakness or giving away of either lower extremity with standing following completion of the evaluation and turning to transfer into her car. She did not require the use of any support other than the evaluator and her husband being present for safety considerations. Mr. Ellis found that appellant demonstrated a discrepancy when comparing the measured and observed range of motion of her left elbow with flexion. In the Oswestry Evaluation, appellant reported that she was only able to tolerate sitting for 10 minutes, but Mr. Ellis reported that she sat on her front-wheeled walker while completing the required paperwork and waiting for the evaluation to be performed for 40 minutes. Mr. Ellis noted that appellant exhibited an episode during the functional testing where she demonstrated a controlled type of fall. Appellant did not report any increase in her symptoms following this episode and demonstrated no difficulty with standing on either lower extremity while turning to transfer into her car with standby assistance. Mr. Ellis concluded that the results of the FCE were, therefore, determined to be unreliable and invalid.

On April 3, 2015 appellant underwent vocational testing.

On an April 10, 2015 Rehabilitation Action Report (Form OWCP-44), the rehabilitation counselor advised that the March 30, 2015 FCE was determined to be invalid as there were inconsistencies in appellant's performance, as well as evidence of symptom magnification and self-limiting pain behavior. The rehabilitation counselor noted that there was an episode during the evaluation where appellant demonstrated a controlled type of fall and the FCE report indicated that she was supported by an evaluator and a technician who were present.

Based on appellant's performance on the March 2015 FCEs, OWCP suspended its vocational rehabilitation efforts on April 13, 2015.

By decision dated April 15, 2015, OWCP reduced appellant's compensation to zero under 5 U.S.C. § 8113(b) as she had failed to participate in vocational rehabilitation efforts.

On April 21, 2015 appellant requested an oral hearing before a representative of the Branch of Hearings and Review, which was held on November 19, 2015. She claimed that she fell about half way through the test and Mr. Ellis would not allow her to continue the March 30, 2015 FCE.

In an April 22, 2015 report, Dr. Fisher noted that appellant had a repeat FCE that was deemed invalid because of her lack of full effort; however, she reported that she did put forth effort and was told by the evaluator to stop the examination. OWCP received additional follow-up reports from Dr. Fisher covering the period May 20, 2015 through January 20, 2016 wherein he reiterated appellant's assertion that she had put forth full effort and had been told by the evaluator to stop the examination.

By decision dated February 4, 2016, OWCP's hearing representative affirmed the April 15, 2015 decision.<sup>6</sup>

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>7</sup> Section 8113(b) of FECA provides that if an individual, without good cause, fails to apply for and undergo vocational rehabilitation when so directed under section 8104 of FECA, OWCP, after finding that in the absence of the failure the wage-earning capacity of the individual would probably have substantially increased, may reduce prospectively the monetary compensation of the individual in accordance with what would probably have been his or her wage-earning capacity in the absence of the failure, until the individual in good faith complies with the direction of OWCP.<sup>8</sup>

Section 10.519 of OWCP's regulations provides that if an employee without good cause fails or refused to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, OWCP will act as follows:

“(b) Where a suitable job has not been identified, because the failure or refusal occurred in the early but necessary stages of a vocational rehabilitation effort (that is, meeting with OWCP's nurses, interviews, testing, counseling, functional capacity evaluations, and work evaluations), OWCP cannot determine what would have been the employee's wage-earning capacity.

“(c) Under the circumstances identified in paragraph (b) of this section, in the absence of evidence to the contrary, OWCP will assume that the vocational rehabilitation effort would have resulted in a return to work with no loss of wage-earning capacity, and OWCP will reduce the employee's monetary compensation accordingly (that is, to zero). This reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of OWCP.”<sup>9</sup>

OWCP procedures provide that specific instances of noncooperation during the plan development stage include: failure to appear for the initial interview; failure to attend meetings with the rehabilitation counselor; failure to undergo an FCE, including failure to put forth optimum effort during the FCE; failure to undergo vocational testing and other work evaluations,

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<sup>6</sup> By decision dated April 22, 2015, OWCP also denied appellant's claim for a schedule award. A different hearing representative affirmed the schedule award decision on a February 9, 2016 decision, which appellant has separately appealed under Docket No. 16-0761.

<sup>7</sup> See *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>8</sup> 5 U.S.C. § 8113(b).

<sup>9</sup> 20 C.F.R. § 10.519.

including lack of response or inappropriate response to directions during testing; and failure to respond to the rehabilitation counselor's telephone calls or written notices.<sup>10</sup>

### ANALYSIS

The Board finds that OWCP improperly reduced appellant's compensation to zero for failing, without good cause, to participate in the vocational rehabilitation efforts.

OWCP accepted that appellant sustained cervical, thoracic, and lumbar sprains, chest wall contusion, permanent aggravation of cervical intervertebral disc disorder with myelopathy, and permanent aggravation of lumbar intervertebral disc degeneration on December 5, 2009 when she fell from a 20-inch high platform at work. Appellant received wage-loss compensation effective February 11, 2010 and was placed on the periodic compensation rolls effective April 8, 2012.

The record reflects that, on February 4, 2015, OWCP referred appellant for vocational rehabilitation services to develop a vocational plan to assist her in returning to gainful employment within her medical limitations. As part of the vocational rehabilitation process appellant was directed to attend and fully participate in an FCE on March 2, 2015. Although she attended the examination, the evaluator's report reflected that she provided inconsistent responses and failed to demonstrate maximum effort. The evaluator concluded that the evaluation was unreliable and invalid.

Appellant was notified that her failure to cooperate without good cause was reason to reduce her compensation benefits. She was directed to attend and fully participate in a second FCE scheduled for March 30, 2015. The second FCE was scheduled with the same physical therapist who had conducted the first FCE and who had found her effort was less than maximum. Appellant attended the evaluation, but the evaluator, Mr. Ellis, again reported that he was unable to accurately assess her full work capacity due to inconsistencies in her test responses and probable less than maximum effort. The evaluator reported that the second FCE was also unreliable and invalid.

The Board finds, however, that the FCE report of March 30, 2015 is of limited probative value because it is speculative and inconsistent. Mr. Ellis specifically noted that he had discussed the results of the prior test with appellant prior to the March 30, 2015 examination and advised her that she could stop any test if she could not complete the activity or her pain increased beyond a level where she could not continue. He then found that appellant produced positive Waddell's signs in the four major categories in which she was able to participate, but opined that this was a positive test for symptom magnification. Mr. Ellis indicated that appellant did not require the use of any support other than himself, a technician, and her husband, who was only present for safety considerations, but then later stated that she had a front-wheeled walker, which she was using as a seat for the duration of the 40-minute evaluation. Based on this, he concluded that there was a probability that appellant's test results were invalid. The Board notes that Mr. Ellis offered no opinion regarding appellant's ability to perform work activities given

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Vocational Rehabilitation Services*, Chapter 2.813.17(b) (February 2011); see *Sam S. Wright*, 56 ECAB 358 (2005).

the tests she was able to perform which would have provided guidance to the vocational rehabilitation counselor of her actual work ability for certain tasks. The Board finds that the March 30, 2015 FCE report is internally inconsistent and speculative in nature. It is therefore of limited probative value.<sup>11</sup>

The Board further finds that the March 30, 2015 FCE is of diminished probative value regarding appellant's ability to perform employment duties because it was scheduled with the same physical therapist, Mr. Ellis, who had conducted the previous FCE. Although OWCP procedures do not require that a second FCE be conducted with one not already affiliated with the case, in such circumstances the physical therapist could have a predisposition for a particular result. The Board notes that the second FCE is virtually identical to the first one in both format and results, internally inconsistent, subject to predisposition, and speculative in nature. As such, the Board finds that it, too, is of limited probative value. To avoid the appearance of a predisposition for any result and to obtain a fair and impartial reporting, the second FCE should have been scheduled with an independent physical therapist or other medical professional not already affiliated with the case to perform the second FCE.<sup>12</sup>

The Board therefore finds that OWCP improperly reduced appellant's compensation benefits to zero, for failure to cooperate in vocational rehabilitation, based on a March 30, 2015 FCE report which was of limited probative value without scheduling a second, independent FCE.

### **CONCLUSION**

The Board finds that OWCP improperly reduced appellant's compensation to zero pursuant to 5 U.S.C. § 8113(b) and 20 C.F.R. § 10.519 for failing to cooperate with vocational rehabilitation efforts.

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<sup>11</sup> See *Y.C.*, Docket No. 15-1442 (issued October 3, 2016).

<sup>12</sup> See *E.S.*, Docket No. 12-467 (issued August 8, 2012) (where a second, independent physical therapist was scheduled to perform an FCE after an initial physical therapist reported that appellant provided inconsistent responses and failed to otherwise comply with the FCE testing), *see also id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 4, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 20, 2017  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board